JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ABDUCTION.

People ex rel. Howey v. Warden of City Prison, 137 N. Y. Supp. 268. *Elements of Offense.* The character of the place into which a female is inveigled is an essential element of the offense of abduction, under Penal Law (Consol. Laws 1909, c. 40) a 70 subd. 2, providing that a person who inveigles an unmarried female of previous chaste character into a house of ill fame, or of assignation, or elsewhere, for purpose of sexual intercourse, is guilty of abduction, and the place must to some extent be a place for purposes of prostitution; and one who induced a female to take an automobile ride with him, and who on the return trip attempted to assault her on or near a public highway, is not guilty of "abduction."

ARRAIGNMENT AND PLEA.

State v. Heft, Ia., 134 N. W. 950. *Waived by Going to Trial.* After conviction of felony the defendant moved in arrest of judgment because the record showed that a demurrer was pending at the time of trial and remained undisposed of until after the verdict and did not show any arraignment of or plea by the defendant. Held that as the grounds stated in the demurrer were not such as to justify the trial court in sustaining it, the defendant suffered no prejudice from the failure to rule thereon. While the absence of a plea would have been fatal at common law, under statutes designed to avoid setting aside verdicts for technical errors in the procedure which have in no way prejudiced the defendant by depriving him of full opportunity to make his defense, especially a provision that if the defendant fails or refuses to plead a plea of not guilty must be entered, the failure to make the formal entry will not prevent the court from rendering judgment on the verdict. By going to trial on the merits the defendant waived the irregularity in the proceedings. Under a statute requiring the court to "examine the record without regard to technical errors or defects which do not affect the substantial rights of the parties and render such judgment on the record as the law demands," the court will refuse to reverse for technical errors which it is manifest from the record could not have prejudicially affected the defense. If an error which the defendant might have taken advantage of before verdict is not thus brought to the court's attention, and is not of such character as to require the granting of a new trial or the sustaining of a motion in arrest of judgment, it will not be considered on appeal, unless it affected the merits of the case to the defendant's prejudice.

CONSTITUTIONAL LAW.

Robertson v. State, Tex. Or. App., S. W. 533. *Confrontation.* Defendant was tried and convicted of murder. On appeal the conviction was set aside. A witness who testified at his trial died and another returned to Italy and remained there. Defendant was tried again, and the testimony given by these two witnesses at the first trial was read to the jury at the second trial. It was contended that this deprived defendant of his constitutional right to be "confronted by the witnesses against him." Held that the confrontation clause was put into the Texas constitution with the construction that it had already received in other jurisdictions. A full review of English and American decisions

and text books showed that this construction permitted the reproduction of such testimony when the witness was dead, beyond the jurisdiction of the court, insane, or kept away by the connivance of the accused. This had been the rule in Texas until 1896 when it was overthrown by the decision in *Cline v. State,* 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. This case was overruled in *Porch v. State,* 51 Tex. Cr. R. 8, 99 S. W. 1122. In *Kemper v. State,* 138 S. W. 1025 the Porch case was overruled and the Cline case affirmed. The court adopted the construction found in the earlier Texas cases and in the Porch case and overruled the Cline and Kemper cases.

State v. Doran, S. Dak., 134 N. W. 53. *Regulation of Physicians.* A statute provided for the examination and licensing of physicians and surgeons and prohibited unlicensed persons from practicing. Itinerant physicians and surgeons were required to procure an itinerant's license also and to pay a fee of $500 per year. Resident physicians and surgeons, licensed and practicing when the act took effect, were excepted from both provisions. A non-resident was convicted of practicing as an itinerant physician without a license. The court said that it was within the police power to prescribe qualifications for the practice of medicine and surgery and to require a license as evidence that the practitioner was qualified. Those already in practice in the state when the act took effect might be permitted to continue, as the fact that they had been practicing was sufficient evidence of proficiency and equivalent to examination and license. The legislature has power to lay an occupation tax on physicians and surgeons, can properly divide them into two classes. (1) itinerants, and (2) all others, and can lay the tax upon one class and not upon the other. But it was held that the exemption of a part of the class of itinerant physicians, those residing in the state, licensed and practicing there when the act took effect, violated the provision of the state constitution that "All taxation shall be equal and uniform." If the provision was intended to classify itinerant physicians into (1) those residing and practicing in the state when the act took effect and (2) those then residing and practicing out of the state, it violated Art. 14 (Art. 4, sec. 2) of the constitution of the United States, because it discriminated against citizens of other states. As the legislature did not intend to subject resident licensed physicians to the tax, and this would result from holding the exemption void and the tax valid, the entire portion of the act relating to itinerant physicians was adjudged to be void. It was said that the rest of the act was valid.

EMBEZZLEMENT.

Frost v. State, Ind. 99 N. E. 419. *Sufficiency of Affidavit.* Crimes Act 1905 (Burns' Ann. St. 1908, a 2285) a 392, denounces as embezzlement the purloining, secreting, etc., of money deposited with or held by a person, firm, corporation or association, by its officer, agent, or employee, who has access to or possession of the money converted. An affidavit purporting to present a charge of embezzlement alleged that a certain person was treasurer of an Odd Fellow Lodge, "and as such treasurer * * * had control and possession" of a sum of money, "the property of the said * * * order of Odd Fellows," and while such treasurer and so possessed of the money converted it. Held that, although the affidavit does not allege that the money was in possession of such defendant "by virtue of his employment," a "treasurer" is one who is intrusted with money, and "as such" means "in that particular character," so that the allegation that the defendant was a treasurer, and as such had control of the funds which he

converted, means that the character of his possession was in his trust relationship, and renders the affidavit sufficient to charge the offense denounced.

ERROR.

McElwain v. Commonwealth, Ky. App. 142 S. W. 234. *Fair Trial.* "Modern thought and modern spirit in criminal procedure will no longer tolerate the rigid technicalities once enforced in the defendant's favor in criminal prosecutions. This court has in its recent declarations aligned itself with the modern view. Its purpose is to examine the record in an effort to ascertain whether the defendant has been fairly tried—a fair trial not measured by iron-clad and inelastic rules so frequently thwarting justice, or wearing away by delays and reversals the possibility of applying justice, but measured instead by the searching application of reason to test from the record whether justice has been done. When such an examination discloses no substantial error against the defendant during the progress of the trial, such as would interfere with his obtaining substantial justice, the judgment will be affirmed."

FORMER JEOPARDY.

Commonwealth v. Prall, Ky. App., 142 S. W. 202. *Action to Recover Fine.* A statute provided that any one who should damage a public highway by unusual use, and fail to repair the same after due notice, should be subject to a fine not exceeding $100. An action was brought to recover this fine. Judgment was given for the defendant. The state appealed and the judgment was reversed. Under statutory authority the case was retried and judgment given for the state. On appeal it was contended that the statute violated the constitutional provision that no one "shall, for the same offense, be twice put in jeopardy for his life or limb." Held that indictments for misdemeanors which subject the defendant to a fine only, are like penal actions, to be treated as a civil suit to collect the fine. Hence they are not within the constitutional provision as to double jeopardy.

IDENTITY OF OFFENSES.

People v. Grzesczak, 137 N. Y. Supp. 538. An acquittal of the charge of arson is not a bar to a prosecution for attempted robbery in the first degree, though the facts in the two cases are identical. But, where on a trial for arson, the only litigated question was the presence of the accused at the place of the offense, and he was acquitted, the question of his presence cannot be again tried in a prosecution for attempted robbery involving the same transaction.

INDICTMENT.

People v. Yarter, 137 N. Y. Supp. 462. *Form of Allegation.* An indictment for violation of the local option law, alleging that four questions provided by Liquor Tax Law (Laws 1896, c. 112) a 13, were "duly submitted," was sufficient without expressly alleging various preliminary steps requisite to the legal submission of such questions; the terms "duly submitted" implying the existence of every fact essential to the proceedings.

People v. Wacke, 137 N. Y. Supp. 652. *Form of Allegation.* An information charging that accused "did unlawfully operate" a moving picture show, being a common show, in violation of the ordinances of the city, stated a conclusion of law, and not a matter of fact. The omission from an information charging the unlawful operation of a moving picture show of the words "without a license" is not a mere failure to allege a matter of form, but is the omission of a matter of substance.

INDICTMENT AND INFORMATION.

State v. Heft, Ia., 134 N. W. 950. *Indorsement by Foreman.* A statute required every indictment to be indorsed "A true bill," and the indorsement to be signed by the foreman of the grand jury. Non-compliance was made ground for a motion to set aside the indictment, to be made before demurrer or plea. An indictment bore the certificate of the clerk of court that it had been presented in open court, in the presence of the grand jury, by their foreman. The statutory indorsement had not been signed by the foreman. The defendant moved to set aside the indictment, but it did not appear that he had relied on this defect as a ground for the motion. His motion was overruled and no exception to the ruling was taken. After conviction he moved in arrest of judgment on this and other grounds. It was held that the defendant either had failed to raise the objection in the manner required by the statute, or if he had so raised it had acquiesced in the adverse ruling of the lower court, and could not subsequently take advantage of the defect by a motion in arrest of judgment.

INJUNCTION AGAINST ENFORCEMENT OF CRIMINAL STATUTE.

State v. Wadhams Oil Co., Wis., 134 N. W. 1120. *Not a Defense.* The defendant sued to enjoin the state supervisor of inspectors from enforcing the oil inspection law, on the ground that it was unconstitutional, and a temporary injunction was issued. The law was ultimately held to be constitutional and the temporary injunction dissolved. The defendant was then prosecuted for a violation of the law committed during the period when the injunction was in force and was convicted. The trial court certified to the supreme court the question whether the injunction was a defense to the criminal prosecution. Assuming, without deciding, that the injunction was valid, the court held that the injunction merely protected the property rights of the defendant and preserved the status quo until final judgment upon the merits. It postponed the enforcement of the law until the rights of the parties under the law were fixed by the final judgment, but did not exempt the defendant from the operation of the law or suspend it as to him. In violating its provisions he acted at his peril, if the act should finally be adjudged to be valid.

INSTRUCTIONS.

Schuster v. State, Ind. 99 N. E. 422. *Jury as Judge of the Law.* An instruction that the jury were the judges of the law as well as of the facts, and, if they could each say on their oaths that they knew the law better than the court, then they had the right to do so, but, before assuming such responsibility, they should be assured that they were not acting from caprice or prejudice, and were controlled by a deep conviction that the court was wrong, and that, before saying that, it was their duty to reflect whether they were better qualified to judge the law than the court, and if under those circumstances they were prepared to say that the court was wrong, the Constitution gave them that right, was erroneous as restricting the jury's authority to determine the law and the facts conferred on them by the Constitution (Burns' Ann. St. 1908, a. 64), providing that in all criminal cases the jury shall have the right to determine the law and the facts.

INTOXICATING LIQUORS.

Van Valkinburgh v. State, Ark., 142 S. W. 843. *Soliciting Orders.* Defendant was convicted of soliciting orders for intoxicating liquors in prohibition ter-

ritory. The following facts were proved: Defendant was a licensed liquor dealer. His night bartender, while in prohibition territory, received an order for liquor, with the money to pay for it. He did not solicit the order, but was asked to send the liquor and agreed to do so as an accommodation. The bartender gave defendant the money in defendant's saloon and told him who wanted the liquor, and defendant shipped the liquor into the prohibition territory by express. The statute provided that any person who receives an order for intoxicating liquor from another and transmits it to a dealer who accepts and fills it is an agent of the dealer. Held that acceptance of the order was tantamount to soliciting it in prohibition territory. The conviction was affirmed.

People v. Martin, Mich., 134 N. W. 1114. *Place of Sale.* A statute prohibited any person directly or indirectly himself or by his clerk, agent, or employee, from manufacturing or selling intoxicating liquors in prohibition counties. A county in which a brewery was located voted prohibition. The brewery company ceased to operate its brewery, but kept an office open, in charge of a bookkeeper. It incorporated and established a place of business in a license county where it sold beer which it bought from another brewing company which was operating in license territory. The bookkeeper in the prohibition county received and forwarded to the place of business in the other county a written order for one case of beer and also payment for the same. The order provided that the beer was to be shipped to the purchaser at a town in the prohibition county by a designated railroad, "All beer to be delivered to me" at the place of shipment in the license county "f. o. b." and the order was not to become binding on the company until filed at its office in the license county and the approval of its secretary indorsed thereon. The order was approved and the beer delivered to an express company in the license county, which delivered it to the purchaser in the prohibition county. The company's secretary was convicted of unlawfully selling intoxicating liquor in the latter county. Held that as the secretary and his associates were responsible for the presence of the bookkeeper in the open office, clothed with authority to take orders and accept money for beer, he indirectly made the sale in that county where the order was given and the money paid over, in spite of the recital that the order should not be binding until filed and approved in the other county. He therefore fell within the letter as well as the spirit of the statute.

JUVENILE COURT ACT.

U. S. v. Behrendsohn, 197 Fed. 953. *Constitutionality.* Since Civ. Code La. art. 305, provides that a father may be excluded from the tutorship of his child for notoriously bad conduct and for other reasons, Louisiana Juvenile Court Act (Acts 1908, No. 83) providing that a parent may forfeit his right to the custody of a child if he is derelict in his duty toward the child, is not in conflict with the Code or unconstitutional as impairing the inalienable right of a parent to the custody of a child.

PLEA IN ABATEMENT.

State v. Tam, Ind. 99 N. E. 424. *Demurrer.* The proper form of demurrer to a plea in abatement in a criminal case is that the plea does not state facts sufficient to quash the indictment, information, or writ, or to abate the action; and a demurrer to a plea, on the ground that it does not allege sufficient facts to constitute a defense, is properly overruled.

RAPE.

People v. Seaman, 137 N. Y. Supp. 294. *Corroboration.* Testimony of the sister of complainant, in rape, that defendant, who was riding with them, took complainant from the wagon and carried her over a fence, that on account of the darkness she could not thereafter see them, but that she heard complainant's cries for help, and that on their return complainant said it hurt her, is not corroboration of penetration, necessary, under Penal Law (Consol. Laws 1909, c. 40) a 2013, for conviction

SENTENCE.

Munson v. McClaughrey, 198 Fed. 72. The sentence of a defendant, convicted on two separate counts of an indictment, under sections 5478 and 5456 or 5475, Revised Statutes (U. S. Comp. St. 1901, pp. 3683, 3694, 3696), of burglary of a postoffice building with intent to commit larceny and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is ultra vires and void as to the sentence for the larceny, and after the defendant has satisfied the sentence for the burglary he is entitled to his release on habeas corpus.

TRIAL.

People v. Goldfarb, 137 N. Y. Supp. 284. *Improper Conduct of District Attorney.* Where, in a prosecution for receiving stolen goods, the proof of defendant's guilty knowledge was scant, and the chief witness for the people had been indicted for receiving from defendant the stolen goods, knowing of the larceny, it was error for the district attorney during the examination of the witness, to state to the court: "We had to indict him and bring him to trial to get any information at all."

State v. Ward, Minn., 134 N. W. 115. *Intent in Breaking and Entering.* Defendant was indicted for breaking and entering a room in a hotel, the room being in the possession of the manager of the hotel, with intent to steal the manager's property. The proof was: The manager was in possession of the hotel, room, and the furniture, towels and other equipment of the room. Three guests were occupying the room. The door was closed when they retired. Early in the morning one of the guests saw the defendant in the room, upon his knees on the floor, removing a pocketbook from the trousers of one of the guests. The defendant was not a guest of the hotel. On being discovered he attempted to escape, and seriously injured a guest who tried to stop him. It was held that there was no variance between the charge and the proof. The gist of the offense was breaking and entering the room with intent to commit larceny therein. The intent with which the defendant entered may be inferred from his attempt to commit larceny. The time and circumstnaces of his entrance and the acts done by him were amply sufficient to show that his entrance was not with the consent of the owner. It was sufficient that the building and room were in the possession and control of the manager of the hotel.